IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63498-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
FREDDIE LEVI HARRIS,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 19, 2010
	)	
	)	

Cox, J. — When a person is convicted of a felony, the sentencing court must impose punishment as provided by the Sentencing Reform Act, chapter 9.94A RCW (SRA).[1] However, the court must give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.[2]

Freddie Harris claims that he should be given credit for his confinement by Canadian immigration authorities in 2005 and 2006. But Harris fails in his burden to show that this confinement was "solely in regard to" his Washington convictions for first degree robbery and first degree kidnapping, both with deadly weapon enhancements; unlawful imprisonment; and bail jumping. Accordingly,

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[1] RCW 9.94A.505(1).

[2] RCW 9.94A.505(6).

we affirm.

The material facts are not genuinely disputed. In February 1997, the State charged Harris with one count of robbery in the second degree and one count of kidnapping in the second degree based on incidents that took place in February 1994. Harris was living in Canada at the time of these charges.[3] According to Harris, he did not learn of these charges until 2003 when a background check, required for application for permanent residency in Canada, revealed criminal charges.[4] Soon after this discovery, he turned himself in at the border. Harris was arraigned in March 2003, subsequently released, and allowed to return to Canada.

He failed to appear for his case scheduling hearing on May 19, 2003, and the trial court issued a bench warrant for his arrest. He was detained by Canadian immigration authorities in November 2003. They later released him on terms and conditions that included a requirement that he report to immigration authorities monthly and for an admissibility hearing. Nevertheless, he failed to appear for at least two Canadian immigration reporting dates in January 2004.[5]

In April 2004, Harris was detained at the Peace Arch border crossing with

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[3] State v. Harris, noted at 146 Wn. App. 1009, 2008 WL 2879070, at *1.

[4] Harris, 2008 WL 2879070, at *1.

[5] Clerk's Papers at 93. This court's first opinion states that Harris "reported to Canadian authorities every Friday, from November 2003 until March or April of 2004." Harris, 2008 WL 2879070, at *1. But this statement is inconsistent with the documentation from a Canadian Immigration hearing officer's notes that Harris first provided in this appeal. That documentation shows that Harris failed to appear on at least two dates in January 2004.

38 pounds of marijuana.[6] He pled guilty in Washington to possession of marijuana with intent to deliver and served 90 days in jail in Whatcom County. He was then transferred to King County for trial on the February 1997 charges.

The trial on these charges began on February 28, 2005. But Harris absconded before the verdict.[7] A jury convicted him of first degree robbery and first degree kidnapping, both with deadly weapon enhancements, unlawful imprisonment, and bail jumping. The trial court issued a bench warrant for his arrest on March 4, 2005.

It appears that Harris returned to British Columbia after absconding from trial in King County. The Canadian Border Services Agency arrested him on April 25, 2005. He escaped from custody while in a hospital for a psychiatric assessment. He was rearrested on June 28, 2005, and returned to Canadian immigration custody.

According to the record that is before us, "Harris was held continuously in Canadian Custody from June 28, 2005 to August 21, 2006 . . . in the Frasier Pre-trial Detention Center while he awaited resolution of his immigration matters."[8] The record also states that "[A]lthough [the state of Washington] was aware that Mr. Harris was being held in Canadian custody, it did not seek his extradition from Canada."[9]

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[6] Harris, 2008 WL 2879070, at *1.

[7] Harris, 2008 WL 2879070, at *1.

[8] Clerk's Papers at 84.

Canadian authorities deported Harris to the United States on August 21, 2006.[1] Harris was then turned over to the Seattle police.[11] Counsel represented to the trial court that, at some time, Harris applied for political asylum in Canada, although the documentation in this record does not expressly state that.

In November 2006, the trial court sentenced Harris to 96 months of total confinement for his convictions arising out of the February 1994 incident.[12] At the sentencing hearing, Harris requested credit for time served in Canadian custody. The trial court apparently denied the motion, but left open the option for defense counsel to obtain supporting documentation and later move to amend the judgment and sentence.

Harris appealed his convictions. This court filed its opinion affirming the judgment and sentence on July 28, 2008.[13]

The trial court appointed new counsel for Harris for the limited purpose of seeking credit for the time he served in Canadian custody. Counsel moved, pursuant to CrR 7.8, for such credit, supporting the motion with copies of Canadian records obtained since the November 2006 sentencing. The motion requested that Harris be given credit for his time served from June 28, 2005, to

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[9] Id.

[1] Id. at 91, 93, 96; Report of Proceedings (Apr. 17, 2009) at 3.

[11] Clerk's Papers at 85.

[12] Clerk's Papers at 52, 55; Harris, 2008 WL 2879070, at *1.

[13] Harris, 2008 WL 2879070.

August 21, 2006. Based on the written submissions of the parties and oral argument, the court denied the motion.

Harris appeals.

CREDIT FOR TIME SERVED

Harris argues that the trial court improperly denied him credit for the time he served in Canadian custody for the period from June 28, 2005 to August 21, 2006. Because he fails in his burden to show that his Canadian custody was "solely in regard to" his Washington convictions, we disagree.

Generally, a decision on a CrR 7.8 motion is reviewable for abuse of discretion.[14] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.[15] "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."[16]

The moving party has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue.[17] An offender

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[14] In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005); State v. Larranaga, 126 Wn. App. 505, 509, 108 P.3d 833 (2005).

[15] In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

[16] Littlefield, 133 Wn.2d at 47 (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996)).

sentenced to a term of confinement has both a constitutional and statutory right to receive credit for all confinement time served before sentencing.[18] RCW 9.94A.505(6) provides:

> The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

"The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."[19]

Case law also offers some guidance as to the meaning of the phrase "solely in regard to." Credit is not allowed for time served on other charges.[2] This court has concluded that a defendant was not confined "solely" on a robbery charge where he was also being detained because his arrest for robbery triggered immediate suspension of his parole.[21]

It is undisputed that Harris was confined by Canadian authorities from

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[17] State v. Rienks, 46 Wn. App. 537, 544-45, 731 P.2d 1116 (1987).

[18] In re Pers. Restraint of Costello, 131 Wn. App. 828, 833, 129 P.3d 827 (2006).

[19] Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

[2] In re Pers. Restraint of Costello, 131 Wn. App. at 833 (citing In re Pers. Restraint of Phelan, 97 Wn.2d 590, 597, 647 P.2d 1026 (1982)).

[21] State v. Williams, 59 Wn. App. 379, 380, 382-83, 796 P.2d 1301 (1990).

June 28, 2005 to August 21, 2006. It is also undisputed that the relevant offenses for purposes of this statute were Harris' 2006 convictions for first degree robbery and first degree kidnapping, both with deadly weapon enhancements, unlawful imprisonment, and bail jumping. At issue is whether the confinement "was ***solely*** in regard to [these offenses]" for which he was sentenced in November 2006.[22]

Our analysis starts with the record on appeal, particularly the documentation, arguments, and representations to the trial court on Harris' CrR 7.8 motion. It appears that the documentation was obtained from Canadian authorities by Harris' new appointed counsel.

One document is a letter dated August 31, 2005, to the Immigration and Refugee Board from an enforcement supervisor at the Detentions Unit. We assume Harris was then housed at that location. The letter says, in relevant part, "[T]he Minister is not aware of any requests for an Order for Extradition from the United States of America or other authority."

This letter is significant in that it shows that, as of its date, the state of Washington had not sought extradition of Harris. Moreover, there is nothing in any of the documentation to show that this state ever sought extradition of Harris. We conclude from this that his confinement in Canada could not have been based on any extradition request for the crimes for which he was sentenced in King County in November 2006.

[22] See RCW 9.94A.505(6) (emphasis added).

There is other documentation, including what appear to be notes written by a Canadian hearing officer dated April 11, 2006. The notes appear to describe what the writer states are "historical facts," including Harris' criminal history in Washington. Among other things, the document also states that Harris "is getting closer to the end of his process in Canada, he has the right to appeal the decision regarding his refugee claim, which [will] likely take about 4 months and then he will be invited to apply for PRRA." It also documents his apparent failure to comply with terms and conditions of a previous release from Canadian immigration custody in 2003.

We take from this document that the Canadian authorities were aware of Harris' pending criminal matters in this state during his time in custody in Canada. But it also appears that he violated terms and conditions of release in connection with whatever process he was pursuing in Canada. His escape and rearrest in Canada are documented in the same notes.

During oral arguments below on the CrR 7.8 motion, counsel for Harris candidly summarized his views of the factual circumstances evidenced by the documentation:

> [Harris] was apprehended in Canada. Because he is not a citizen of Canada, he was apprehended on an immigration hold. He was held in immigration custody from June of 2005 until August of 2006.
>
> The reason he was held is because there was a pending asylum application and that application took that period of time to work through the process.
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> During that process, every 30 days Mr. Harris was entitled to a detention status review. At each of those hearings – or at least at each of those hearings for which I have been able to obtain

> records, the matter of the outstanding warrant in this case was discussed and that warrant was used as one of the bases upon which to hold him in Canadian custody.
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> It's not disputed that the only reason he was held in Canadian custody was because of the immigration hold. It's also not disputed that one of the bases that the review board in Canada considered for holding him was the outstanding warrant here. So there is no issue of him being held on another crime in Canada or another crime, frankly, anywhere else. It's not disputed that the U.S. did not seek extradition in this matter.[23]

After the State made its comments in response, the court denied the motion.

A fair reading of this record and the arguments by respective counsel below, make clear that the court correctly decided to deny the motion. The plain words of the statute state that credit for time served is conditioned on confinement being "solely in regard to the offense for which the offender is being sentenced."[24] As agreed below and evidenced by the record, Harris was not held in Canada "solely in regard to" his convictions in Washington.

The fact that Canadian authorities were aware of his criminal status in this state is irrelevant to the credit for time served statute. The statute clearly requires that the confinement in Canada be solely for the Washington offenses. Absent an extradition request or other evidence that the Canadian authorities confined Harris solely for his Washington crimes, he is not entitled to credit on his sentences for those crimes. The trial court properly exercised its discretion

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[23] Report of Proceedings (Apr. 17, 2009) at 3-4.

[24] RCW 9.94A.505(6).

in denying the CrR 7.8 motion.

Despite this clear record, Harris argues on appeal that his confinement in Canada was "solely in regard to" the offenses at issue here. Specifically, he claims that "Canada's decision to keep [him] detained in custody during his immigration proceedings was made in regard to this Washington case."[25] He cites a series of provisions from Canada's Immigration and Refugee Protection Act for support. These arguments do nothing to undermine the trial court's decision to deny the motion.

In essence, Harris attempts to show:

- That the Canadian Immigration Division may only detain a person pending an immigration hearing if the Division finds that the person is "a danger to the public" or is "unlikely to appear" for his or her immigration hearing;[26]
- That nothing in the record suggests that the Canadian authorities found Harris to be "a danger to the public";[27]
- That the factors the Immigration Division must consider in determining whether a person is "unlikely to appear" implicate Harris' Washington warrant because one of the factors is being a fugitive from justice in a foreign jurisdiction.[28]

Therefore, Harris argues, the record shows that the Canadian authorities attributed "significance" to the Washington criminal proceeding and that "it

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[25] Brief of Appellant at 11.

[26] Id. at 12-13 (citing Immigration and Refugee Protection Act, 2001 S.C., ch. 27, §§ 58-59 (Can.)).

[27] Id. at 13.

[28] Id. at 14-15 (citing Immigration and Refugee Protection Act, 2001 S.C., ch. 27, §§ 244-245 (Can.)).

appears Harris most likely would have been released from custody . . . pending his deportation from Canada if it were not for the criminal proceedings in Washington."[29]

These speculative arguments selectively ignore unfavorable parts of this record. Whether the Canadian authorities attributed significance to these Washington criminal proceedings is insufficient to meet the terms of the statute. Custody in Canada must have been solely for the crimes for which Harris was sentenced. It was not. He had a record in Canada of escape from custody there, apparently violating the terms and conditions of his release. Moreover, his confinement there appears to have been based on Canada's immigration policies.

Harris also relies heavily on a Canadian Immigration hearing officer's notes from an April 11, 2006 hearing.[3] But a fair reading of these notes supports the conclusion that the Washington convictions were among the reasons that Canadian authorities kept Harris in custody, not the sole basis. Again, this showing is insufficient under the statute to support credit for time served in Canada.

In sum, Harris has failed to carry his burden to prove that the trial court abused its discretion by denying his CrR 7.8 motion for credit for his time served in Canadian custody. Under the terms of the controlling statute, he does not

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[29] Id. at 16.

[3] Id. at 15-16.

qualify for credit while in Canadian custody.

Harris cites two out-of-state cases that address credit for time served in a foreign jurisdiction: People v. Nagler[31] and Nicastro v. Cuyler.[32] But neither case involves the question of whether the defendant had been held "solely in regard to" the offense for which he was being sentenced. Accordingly, neither case is helpful here.

Relying on State v. Brown,[33] Harris next argues that the trial court used the wrong legal standard when it denied his motion. A close reading of this record does not clearly substantiate this claim.

Here, after hearing the oral argument of the parties below and considering the written submissions, the court denied the motion. In doing so, the trial court stated,

> I am going to deny the motion to give him credit for the time he has spent in custody in Canada.
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> The basis for the ruling are [sic] his willful acts wound him up in this situation. He had a choice to make and he made the choice that he was going to seek asylum in Canada rather than deal with this charge. ***I would sign the order as proposed by the State***.[34]

We note that the order proposed by the State that the court signed states in relevant part:

> The above-entitled Court, having heard a motion by the defendant to ***award him credit for time he served in Canadian custody from***

[31] 251 N.Y.S.2d 107 (N.Y. App. Div. 1964).

[32] 78 Pa. Cmwlth. 539, 467 A.2d 1218 (1983).

[33] 55 Wn. App. 738, 780 P.2d 880 (1989).

[34] Report of Proceedings (Apr. 17, 2009) at 8 (emphasis added).

6/28/05 to 8/21/06 on unrelated matters.

It is hereby ordered that the defendant's motion is denied.[35]

Harris bases his argument on the first thee sentences of the court's oral remarks and ignores the fourth. Notwithstanding the portion of the court's oral remarks that Harris emphasizes, the order the court signed is the final expression of the court's ruling. It clearly states that the Canadian custody for which Harris sought credit was "on unrelated matters." As we explained earlier in this opinion, the failure of Harris to show that his Canadian custody was solely based on his Washington convictions was a correct basis for denying the motion. In short, it is not clear to us that the court used the wrong standard in making its ruling, notwithstanding its oral remarks.

Even assuming, without deciding, that the trial court did use an incorrect standard in deciding the motion, Harris has shown no prejudice. We may affirm a trial court's decision on any ground established by the law and the record.[36] Here, the record and the law establish that the court correctly decided to deny Harris' motion. Accordingly, we affirm on the basis we discussed earlier in this opinion.

Because we have determined that the trial court's decision is correct, there is no need to address Harris' reliance on Brown.

ADDITIONAL GROUNDS FOR REVIEW

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[35] Clerk's Papers at 103 (emphasis added).

[36] State v. Villarreal, 97 Wn. App. 636, 643, 984 P.2d 1064 (1999), review denied, 140 Wn.2d 1008 (2000).

Harris states additional grounds for review. None of them relate to the order appealed in this case. Instead, they assert new grounds for relief related to convictions that this court has already considered on direct appeal.[37] Harris argues that the State's filing of an amended information was barred by the statute of limitations period; that the State's amendment of the information was untimely; that the State was relieved of its burden to prove each of the elements of the crime beyond a reasonable doubt as to counts I and IV; that the trial court erred in failing to instruct the jury on the lesser included offenses of second degree robbery and second degree kidnapping; and that the kidnapping charge in count IV should have merged to the robbery charge in count I. These issues are not properly before us.

The scope of our review of the order on the CrR 7.8 motion is limited.[38] "[A]n unappealed final judgment cannot be restored to an appellate track by filing a motion under CrR 7.8 and appealing the denial of the motion."[39] New assignments of error to the judgment of conviction are not reviewable on appeal from an order denying a motion to vacate.[4]

We have decided only the issue properly before us and will not address other issues.

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[37] Harris, 2008 WL 2879070.

[38] State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

[39] Larranaga, 126 Wn. App. at 509 (citing Gaut, 111 Wn. App. at 881).

[4] Gaut, 111 Wn. App. at 882.

We affirm the trial court's order denying Harris' motion.

Cox, J.

WE CONCUR: